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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/821,376

03/29/2001

David Kee Yang

8491

3463

27752

7590

10/23/2007

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EXAMINER

PRATT, HELEN F

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

10/23/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/821,376	<b>Applicant(s)</b> YANG ET AL.	
	<b>Examiner</b> Helen F. Pratt	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 15 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-6, 8-11, 13-18 and 20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6, 8-11, 13-18 and 20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4, 8-11, 13-18, 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Product Alert (v. 328, n. 11) in view of Peroutka (US 2002/0122815 A1) and further in view of Abou-Nemeh et al. (6,348,264).

Product Alert discusses the product "Cinagro Energy Plus Healthy Whole Body Tonic" that contains juices, green tea, several B vitamins and agave nectar. Green tea contains flavonals and bracers such as caffeine and cachecan. Claims 1-3, and 6, 9 differ from the reference in the particular Glycemic Index (GI) and in the particular amount of fructose in the composition. It is known that juices contain various sugars such as fructose and sucrose. Peroutka discloses that it is known to administer low Glucose Index (GI foods) such as fructose (page 4, para. 0048, lines 1-13). The reference discloses that a functional food product can have a low GI of less than 50 preferably less than 30 (page 5, col. 1, lines 1-6). Therefore, if one wanted to produce a composition with a glycemic index of 55 or less, it would have been obvious to use the teaching of Peroutka which disclose that fructose slows the digestion of carbohydrates. It would have been obvious to use juices containing fructose in amounts

which would produce a low GI as shown by Peroutka and to make a product having a GI of less than 55 in the composition of Product Alert.

Claim 1 further requires the use of maltodextrin with a dextrose equivalent (DE) of less than 22. Abou-Nemeh et al. disclose that it is known to make maltodextrins with a low DE of less than 20 for use in food items. Since the maltodextrin (MD) acts as a bodying agent, it would form the same function in beverages (col. 1, lines 40-50). The reference also discloses MD with a DE of less than 25 for use in beverages (col. 1, lines 25-40, col. 30, lines 10-14). No patentable distinction is seen in the use of MD's with a DE of less than 25 and in less than 22 absent anything new or unobvious. Therefore, it would have been obvious to use known MD's in beverages for their known function of adding body to the composition.

Claim 4 further requires at least 50% of water in the composition. Generally beverages contain at least 50% water or else they would be a concentrate. Nothing is seen that the composition of Product Alert does not contain the claimed amount of water since it is a beverage and not a concentrate. Therefore, it would have been obvious to make a beverage composition with at least 50% water.

Claim 8 further requires particular amounts of flavanols and bracers in the composition and claim 11 particular amounts of B6. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a beverage product, properties such as nutrition and ingredients to allow for alertness are important. It appears that the precise ingredients as well as their proportions affect the nutrition and

degree of alertness allowed of the product, and thus are result effective variables which one of ordinary skill in the art would routinely optimize. Therefore, it would have been obvious to optimize the amounts of flavanols and bracers to give characteristics such as nutrition and alertness to the composition.

Nothing new is seen in the use of soluble fiber as in claim 10, which is found in the juices of the reference to Product Alert. Complex carbohydrates are an obvious addition to a beverage. Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Claim 13 further requires various amounts of ingredients and a GI of less than about 35. Peroutka discloses a GI of less than 30 as above. *In re Thorpe*, supra again

applies. Therefore, it would have been obvious to make a product containing particular amounts of ingredients using a low GI index.

The limitations of claims 14 –17 have been disclosed above and are obvious for those reasons.

Claim 18 is to a kit containing the claimed composition. However, beverages are known as claimed whatever type of packaging they are housed in. Carriers for bottles are well known as in 6 packs. Since nothing more than a kit is claimed and the beverage, it is seen that it would have been obvious to bottle the above composition and put it in a box to make a kit.

Claim 20 further requires administering the claimed composition to a mammal in order to enhance the perceived energy of the mammal. However, the claimed ingredients have been shown in combination. Caffeine, which is known to be contained in the composition, is known for its stimulating effects. Nothing has been shown that the claimed composition contains any more stimulating effects than the products of the combined references. Therefore, it would have been obvious to use the composition as disclosed by the combined references for its stimulating effects.

Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims and further in view of XP-002208458 –(Jakarta ginger, applicant's reference)

Claim 5 further requires the use of 2% total free sugars, which can be glucose, sucrose and maltose. Jakarta Ginger discloses a ginger and green tea that contains less than 2% sugars (product page). Sugars are generally considered to be sucrose

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unless otherwise stated. Therefore, it would have been obvious to make a product containing less than 2% sugars as shown by Jakarta ginger in the composition of the combined references.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Keith Hendricks, can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 10-19-07

  
**HELEN PRATT**  
**PRIMARY EXAMINER**